## INSPECTOR-GENERAL OF POLICE & ANOR. v. LEE KIM HOONG

[F.C. (Suffian L.P., Wan Suleiman & Syed Othman F.JJ.) July 2, 6 & 20, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 4 of 1979]

*Administrative Law — Habeas Corpus — Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Whether Ordinance laid before both Houses of Parliament — Evidence by affidavit showing Ordinance was so laid — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 3(3) — Federal Constitution, arts. 3(1) and 150.*

*Constitutional Law — Whether Emergency Ordinance laid before Houses of Parliament — Proof of — Ordinance made when Parliament not sitting — Validity of — Federal Constitution, arts. 3(1) & 150 — Emergency (Essential Powers) Act, 1978.*

*Criminal Law and Procedure — Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Person to be informed of grounds of arrest — Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Federal Constitution, arts. 5(3) & 160.*

In this case the respondent had been detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. In *habeas corpus* proceedings taken by the respondent, it was argued that as the Ordinance had not been laid before Parliament, as required by Article 150(3) of the Federal Constitution, it did not have the force of law. At the hearing in the High Court the Deputy Public Prosecutor conceded that the Ordinance had not been laid before Parliament and therefore it was held that the detention of the respondent was unlawful and he was released. On appeal, the Federal Court allowed additional evidence by affidavit, which showed that the Ordinance had been laid before the Houses of Parliament.

**Held:** (1) it was clear that the Ordinance had been properly laid before both Houses of Parliament as required by the Constitution and therefore it has the force of law;

(2) the Ordinance was promulgated at a time when Parliament was not sitting and therefore was valid and did not need to be validated by the Emergency (Essential Powers) Act, 1979;

(3) the detention of the respondent was lawful and the order of the learned Judge must be set aside.

*Case referred to:-*

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

HIGH COURT.

*K. Pasupathy* for the applicant.

*T.S. Sambanthamurthi* (Deputy Public Prosecutor) for the respondent.

**Harun J.** (delivering oral judgment): This is an application for *habeas corpus*.

On February 16, 1979 the applicant (Lee) heard that the police were looking for him. His solicitor then took him to Jalan Bandar Police Station at 3 p.m. that day. At the station, Inspector Idris said that the police wanted Lee for questioning. The solicitor left Lee at the station but returned at 5.30 p.m. to enquire about Lee. At 7.30 p.m. he was told that Lee was being detained in police custody. On the following day, Lee was not produced before a Magistrate as required by Article 5(4) of the Federal Constitution.

On February 19, 1979, when there was still no news of Lee, the solicitor wrote a letter to the Chief Police Officer of the Federal Territory indicating that he was commencing habeas corpus proceedings and requested for a copy of the warrant under which Lee was being detained in compliance with section 368 of the Criminal Procedure Code. He also made a request to interview Lee to take a statement from him. When there was still no news of Lee or reply to the February 19 letter, the solicitor commenced these proceedings on February 26, 1979.

According to the respondents, Lee was arrested on February 16, 1979 under section 3 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 (hereinafter referred to as the 1969 Ordinance). As enquiries could not be completed within 24 hours of arrest, Inspector Idris Ayob authorised his further detention for an additional period of 24 hours with effect from 5.40 p.m. on February 17, 1979. I pause here to observe that this authorisation is defective as Lee's arrest commenced at 3 p.m. on February 16, 1979 when the solicitor first handed him to Inspector Idris and his further detention should have commenced at or before 3 p.m. on February 17, 1979. Section 3(3)(a) of the 1969 Ordinance reads:

"he shall not be detained for *more than twenty-four hours* except with the authority of a police officer of or above the rank of Inspector;"

The authorisation itself, however, is dated February 16, 1979.

Be that as it may, on the following day ASP Lim Meng Jit authorised the further detention of Lee for an additional period of 28 days from February 18, 1979 to March 17, 1979 in exercise of his powers under section 3(3)(b) of the 1969 Ordinance which authorises a police officer above the rank of Assistant Superintendent to detain a person pending enquiries for more than 48 hours but not exceeding 30 days.

Section 3(5) of the 1969 Ordinance reads:—

"Any person detained under the powers conferred by this section shall be *deemed to be in lawful custody*, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister."

A person may be arrested without warrant of arrest and detained pending enquiries by the police under section 3 of the 1969 Ordinance for a period not exceeding 60 days for any of the following reasons:

(a) Under section 3(1) that there is reason to believe that there are grounds which would justify his detention by the Minister for any period not exceeding two years under section 4(1) viz:
   (i) With a view to preventing him from acting in any manner prejudicial to public order; or
   (ii) It is necessary for the suppression of violence; or
   (iii) It is necessary for the prevention of crimes involving violence;

(b) Under section 3(2)
   (i) Fails to satisfy the police as to his identity; or
   (ii) Fails to satisfy the police as to the purposes for which he is in the place where he is found; or
   (iii) Suspected by the police of having acted or

being about to act or being likely to act in any manner prejudicial to public order; or

(iv) The police have reason to believe that it is necessary for the suppression of violence; or

(v) The police have reason to believe that it is necessary for the prevention of crimes involving violence.

The respondents have not stated whether the applicant is being detained under section 3(1) or section 3(2) of the 1969 Ordinance. The difference is important to a detained person because if it is under section 3(1) then he may be detained by the Minister for up to two years whereas if it is under section 3(2) then at worst he may be detained for not more than 60 days.

To exercise its powers under section 3 of the 1969 Ordinance, the police must have known on February 16, 1979 the grounds for arresting and detaining the applicant. It is clear from the wording of the section that the police must have this knowledge *before the arrest* since under section 3(2) there must be *failure to satisfy* grounds (i) or (ii); or *suspicion* of ground (iii); or *reason to believe* grounds (iv) or (v) or grounds (i), (ii) or (iii) of section 3(1). There is no question of arresting a person first under this section and after enquiries to determine if possible the particular grounds of his arrest and subsequent detention. The purpose of the enquiry is merely to confirm or otherwise the reasons for the belief or suspicion or the failure to give a satisfactory explanation required by the police.

Article 5(3) of the Federal Constitution reads:

"Where a person is arrested he shall be informed as soon as may be of *the grounds of his arrest* and shall be allowed to consult and be defended by a legal practitioner of his choice."

In applying this constitutional provision to an arrest under section 3 of the 1969 Ordinance, there is no reason why Lee could not have been informed of the grounds of his arrest on February 16, 1969. Now this is precisely the information which his solicitor was seeking on February 16, 1979 and for the next ten days before instituting these proceedings. Even now the applicant, his solicitor and family still do not know. I should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that "Lee was arrested because we have reason to believe that it is necessary for the prevention of crimes involving violence."

I realise the police have a difficult duty to perform to maintain the public peace and security. They should by all means exercise their powers under the law but in exercising these extra-ordinary powers of detention without trial, they should be careful not to raise in the minds of the public any suspicion of tyranny. They cannot avoid such suspicion if a man is detained by them for days without any reason being given. I think, this failure to communicate is the real complaint in this application.

On the evidence before me, I am satisfied, that the detention of the applicant is in accordance with section 3 of the 1969 Ordinance. However, it is contended by the applicant that the 1969 Ordinance has ceased to remain in force for the following reasons:

(i) It was enacted by the Yang di-Pertuan Agong on May 16, 1969 under Article 150(2) of the Federal Constitution.

(ii) Parliament sat on February 20, 1971.

(iii) The Ordinance has not been laid before Parliament as required by Article 150(3) of the Federal Constitution.

(iv) The Ordinance is not saved by the Emergency (Essential Powers) Act, 1979.

Taking the last point first, I hold that the 1979 Act did not save the 1969 Ordinance as the Act only dealt with Ordinances and Regulations made on or after February 20, 1971 which is not the case here. Now the object of Article 150(3) is for the Yang di-Pertuan Agong to give an account, as it were, to Parliament of all things done by him during their absence. It seems to me that the requirement that Ordinances promulgated during an emergency by the Yang di-Pertuan Agong shall be laid before both Houses of Parliament is a mandatory one and the effect of non-compliance is that the Ordinance will cease to have effect after Parliament had sat. The learned Deputy Public Prosecutor concedes that the 1969 Ordinance was not laid before Parliament. In the event, I am compelled to hold that the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 has ceased to have effect.

I accordingly find that the applicant is being detained under a law which no longer exists and therefore his detention is unlawful and order his immediate release.

*From the above judgment the Inspector-General and the Chief Police Officer of the Federal Territory appealed to the Federal Court.*

FEDERAL COURT.

*Mohamed Noor bin Haji Ahmad* (Deputy Public Prosecutor) for the appellants.

*K. Pasupathy* for the respondent.

*Cur. Adv. Vult.*

**Suffian L.P.** (delivering the grounds of judgment of the Court): We allowed this appeal and now give our reasons.

On February 16, 1979, the applicant heard that the police were looking for him, so Mr. K. Pasupathy, advocate and solicitor, who knew him and for whom he had worked, personally took him to the Jalan Bandar police station where Inspector Idris bin Ayob said that the police wanted to question the applicant. That was at 3 p.m. Mr. K. Pasupathy went away. At 5.30 p.m. he returned to the police station. At 7.30 p.m. he was told by the Inspector that the applicant was being detained. Three days later on February 19, 1979, Mr. K. Pasupathy wrote to the Chief Police Officer, Federal Territory ("C.P.O.") to ask for a copy of the warrant under which the applicant was detained. He got no reply. Seven days later on February 26 Mr. K. Pasupathy applied by notice of motion under Chapter XXXVI of the Criminal Procedure Code for

an order by way of habeas corpus, citing the Inspector-General of Police and the C.P.O., as respondents.

The application was heard on February 28 when it transpired that the applicant had been detained by the police under section 3(3) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("the Ordinance").

Now that Ordinance was promulgated by His Majesty three days after May 13, riots. He promulgated it under clause (2) of Article 150 of the Constitution, after he had a few days earlier issued a Proclamation of Emergency under clause (1) of the same Article. Clearly His Majesty had power to do so, as Parliament was not then sitting and His Majesty was then satisfied that immediate action was required. But clause (3) of the Article prescribes a condition subsequent. It provides:

"... any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament";

otherwise it will not have "the force of law", see clause (2).

The Ordinance itself does not say whether or not it had been laid before both Houses of Parliament. This is not surprising as the Ordinance was gazetted in May 1969 and Parliament did not meet again until February 20, 1971.

As there was no indication that the Ordinance had been laid before both Houses, at the hearing Mr. K. Pasupathy took the point quite fairly that the Ordinance did not have the force of law as it had not been so laid. He did so, he said before us, after he had gone to enquire at the Library of Parliament. The learned Deputy Public Prosecutor conceded that the Ordinance had not been laid before Parliament, and so the learned trial judge held that the detention was unlawful and ordered the applicant to be released.

The only issue in the High Court, and also before us, was whether or not the Ordinance had been laid before Parliament.

At the appeal by the respondents before us, we allowed additional evidence to be adduced, which evidence consisted of an affidavit by Encik Ghazali bin Haji Abdul Hamid, Assistant Secretary to Parliament. Encik Mohamed Noor, counsel for the appellants, referred us to Standing Order 19(3) of the Senate and to Standing Order 20(3) of the lower House which provide that the presentation of all papers shall be entered in the Votes and Proceedings of the day on which they are presented. Thus Votes and Proceedings are a kind of minutes. Next we were referred to the Votes and Proceedings of each House, and the Votes and Proceedings of the Senate for February 20, 1971, showed that the Ordinance was laid before that House that day (see page 3, item 6), and those of the lower House for February 24, 1971, that it was laid before that House that day (see page 30, item 6).

Thus it is clear, in our judgment, that the Ordinance has been properly laid before both Houses as is required by the Constitution and it therefore has the force of law.

We refused Mr. K. Pasupathy leave to cross-examine Encik Ghazali on his affidavit. He said he wanted to ask Encik Ghazali what happened after a paper had been laid before Parliament. We did not think this evidence relevant. In any event, Article 3(1) of the Constitution provides:—

"The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court."

This means that if records kept by Parliament show that a paper had been laid, that is conclusive as far as the courts are concerned.

As the Ordinance has the force of law, the detention of the applicant was therefore lawful and the learned judge was in error in ordering his release. We therefore allowed the appeal and set aside the learned judge's order.

If the police are so minded, they can start afresh against the applicant.

There were other matters mentioned in the learned judge's judgment as to which there is no need for us to say anything, because they were subsidiary issues.

However, we would advert to one matter mentioned by the learned judge, and that is that the Ordinance has not been validated by the Emergency (Essential Powers) Act, 1979, Act 216. In our judgment the Ordinance has been valid all along because it was promulgated at a time when Parliament was not sitting and not after Parliament has first sat on February 20, 1971. Act 216 was intended to validate ordinances and regulations made after Parliament had first sat on that date, which had been declared invalid by His Majesty acting on the advice of the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor*.[1]

One last thing. This case shows vividly the desirability of Gazetting the fact that a statutory instrument has been laid before Parliament. How else is the public to know? Not many have the time or temerity to go and ask the people working in the office of Parliament. In this case counsel for the applicant was sure it had not been laid, after a visit to the Library of Parliament. The learned Deputy Public Prosecutor in the lower court was also sure it had not been laid — else he would not have conceded. The judge made the wrong decision because he relied on this concession. If the laying had been Gazetted, then at least judges and lawyers would have known about it (assuming that the *Gazette* is properly and promptly indexed); and there would have been no need for Mr. Pasupathy to visit Parliament House and no need for this appeal and no need for Encik Ghazali to swear an affidavit and no need for Encik Mohamed Noor to apply to adduce additional evidence.

*Appeal allowed.*

Solicitors: *Pasupathy & Co.*